145 U.S. 561

RECORD, CASE No. 13,497.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1891.

TERM No., 332.

ADOLPH ROSSMAN, PLAINTIFF IN ERROR,

vs.

EDWARD L. HEDDEN, LATE COLLECTOR OF THE PORT OF NEW YORK.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

FILED FEBRUARY 26, 1889.

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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., JANUARY 25, 1892.

1 UNITED STATES OF AMERICA, *ss:*

[Seal of U. S. Circuit Court, South. Dist. New York.]

The President of the United States to the judges of the circuit court of the United States for the southern district of New York, Greeting:

Because in the records and proceedings and also in the rendition of the judgment of a plea which is in the said circuit court, before you, between Adolph Rossman, plaintiff, and Edward L. Hedden, defendant, a manifest error hath happened, to the great damage of the said plaintiff, as by his complaint appears, we, being willing that the error, if any hath been, should be duly corrected and full and speedy justice done to the party aforesaid in this behalf, do command you, if judgment be therein given, that, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you may have the same at Washington on the second Monday of October, eighteen hundred and eighty-nine, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done thereon to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the said Supreme Court, the 6th day of February, in the year of our Lord one thousand eight hundred and eighty-nine.

JOHN A. SHIELDS, *Clerk.*

The foregoing writ is hereby allowed.

E. HENRY LACOMBE.

2 [Endorsed:] E. & A. A. 805. 11312. U. S. Supreme Court. Adolph Rossman, plaintiff in error, against Edward L. Henden, defendant in error. Writ of error. Hartley & Coleman, attorneys for plaintiff in error. Due service of a copy of the within writ of error is hereby admitted this 7th day of Feb'y, 1889. Stephen A. Walker, P., attorney for defendant in error.

[Stamped:] U. S. circuit court. Filed Feb. 7, 1889. John A. Shields, clerk. 1.45, ch.

UNITED STATES OF AMERICA, *Southern District of New York,* } *ss:*

I, John A. Shields, clerk of the circuit court of the United States of America for the southern district of New York, in the second circuit, by virtue of the foregoing writ of error and in obedience thereto, do hereby certify that the following pages, numbered from 3 to 35, inclusive, contain a true and complete transcript of the records and proceedings had in said court in the case of Adolph

Rossman, plaintiff in error, against Edward L. Hedden, defendant in error, as the same remain of record and on file in said office.

In testimony whereof I have caused the seal of the said court to be hereunto affixed, at the city of New York, in the southern district of New York, in the second circuit, this twentieth day of February, in the year of our Lord one thousand eight hundred and eighty-nine, and of the Independence of the United States the one hundred and thirteenth.

Seal of U. S. Circuit Court, South. Dist. New York.

JOHN A. SHIELDS, *Clerk.*

3 United States Circuit Court for the Southern District of New York.

ADOLPH ROSSMAN
against
EDWARD L. HEDDEN.

To the above-named defendant:

You are hereby summoned to answer the complaint in this action and to serve a copy of your answer on the plaintiff's attorneys within twenty days after the service of this summons, exclusive of the day of service, and in case of your failure to appear or answer judgment will be taken against you by default for the relief demanded in the complaint.

Witness the Honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, at the city of New [L. s.] York, this 10 day of November, in the year one thousand eight hundred and eighty-six.

TIMOTHY GRIFFITH, *Clerk.*

HARTLEY & COLEMAN,
Plaintiff's Attorneys.

Office and post-office address, 62 Wall St., New York city.

4 [Endorsed:] 11312. United States circuit court, southern district of New York. A. Rossman *vs.* E. L. Hedden. Summons. Hartley & Coleman, plaintiff's attorneys. Served Nov. 10th, 1886. E. L. Hedden, per F. S. McAvoy, att'y-in-fact. Received U. S. attorney's office Nov. 15, 1886.

5 U. S. Circuit Court, Southern District of New York.

ADOLPH ROSSMAN, Plaintiff,
vs.
EDWARD L. HEDDEN, Defendant.
Complaint.

Plaintiff complains—

1st. That defendant was, during the times hereinafter named, collector of customs of the United States at the port of New York.

2. That plaintiff during said times duly imported and entered

at the port of New York the goods described in the bill of particulars annexed.

3. That plaintiff, in order to obtain said goods, was compelled to pay the defendant, as such collector, in excess of the lawful rate of duty on said goods and of the amount required by law, the sum of one hundred & fifty-six $\frac{15}{100}$ dollars.

4th. The plaintiff filed with said defendant due and timely protests in writing upon each entry of said goods against his decision exacting such duty, setting forth distinctly and specifically the grounds of objection thereto.

5th. That plaintiff made due and timely appeals on each entry to the Secretary of the Treasury, who affirmed the decision of the defendant upon certain of said entries, and as to the rest
6 neglected for more than ninety days, as well from the dates of said appeals as prior to the commencement of this action, to decide said appeals.

6th. That the bill of particulars hereto annexed states for each importation separately the date of entry at the custom-house, of the payment of duty in excess, of the filing of the said protests, of the appeal to the Secretary of the Treasury, and of his decision thereon, if rendered, together with the other particulars required by law, and is made a part hereof.

7th. That said sum so exacted as aforesaid has never been repaid to plaintiff and is still due and owing to him.

Wherefore plaintiff demands judgment against defendant for the sum so exacted as aforesaid, with interest on the several sums named in the bill of particulars from the several dates of payment as appear thereby, together with the costs and disbursements of this action.

HARTLEY & COLEMAN,
Attorneys for Plaintiff's.

(Endorsed:) U. S. circuit court, southern district of New York. A. Rossman against Edward L. Hedden. Complaint. Hartley & Coleman, pl'ff's attorneys, 62 Wall street, New York city. U. S. attorney received Nov. 19, 1886.

7 *Bill of Particulars.*

Name of importer (for all the importations), A. Rossman.

Description of goods.	Whence imported.	Name of vessel.	Date of invoice.	Date of entry at custom-house.	Amount of duty illegally exacted.	Date of payment of duties in excess.	Protest filed & date of appeal to Secretary of the Treasury.	Date of Secretary's decision.	
			1	8	8	6.	1 8	8 6.	
Tiles.....	Havre.....	Canada	Feb. 10	Feb. 26	$12 20	Feb. 26. May 11	May 10	Aug. 26	5303
	Glasgow	Furnessia	May 13	May 25	59 60	May 25. June 25	June 24	None.	6639
	Liverpool	Rhaelia	June 1	June 14	84 35	June 15. ..... July 13.	July 13	do.	7196

8 [Endorsed:] U. S. circuit court, southern district of New York. A. Rossman against Edward L. Hedden. Bill of particulars. Hartley & Coleman, pl'ff's att'ys, 62 Wall St., New York city. Received U. S. attorney's office Nov. 19, 1886.

9 Circuit Court of the United States for the Southern District of New York.

ADOLPH ROSSMAN
versus
EDWARD L. HEDDEN, Collector, etc. } 11312.

The defendant answers to the complaint as follows:

I. He denies that the true duty or that the true and lawful rate of duty on the goods referred to in the complaint was as stated in the complaint, and he denies that the plaintiff was compelled to pay or did pay defendant, as collector or otherwise, the sum stated in the complaint, or any sum in excess of the amount required by law as duties upon the said goods, or that any sum of money unauthorized by law was exacted as duties on said goods or otherwise.

II. He denies that the plaintiff filed with defendant any protest or protests in writing in which the grounds of objections to the exaction of duties on said goods were distinctly and specifically stated.

III. He denies that the sum stated in the complaint or any sum is now due and owing the plaintiff.

IV. He denies that he has any knowledge or information sufficient to form a belief as to whether the goods alleged in the complaint to have been imported at the times therein mentioned were in fact such goods as are described in said complaint.

V. And, further answering, he alleges that no protest was
10 filed within ten days after the ascertainment and liquidation of the duties thereon.

VI. And, further answering, he alleges that no appeal was taken to the Secretary of the Treasury within thirty days after the date of the ascertainment and liquidation of duties thereon.

VII. And, further answering, he alleges that this action was not brought within ninety days after the decision by Secretary of the Treasury on the appeal taken from the ascertainment and liquidation of duties thereon or within ninety days after payment of duties paid thereon after such decision.

VIII. And, further answering, he alleges that this action was brought without the decision of the Secretary of the Treasury on the appeal from the ascertainment and liquidation of duties thereon having been first had and without ninety days having elapsed from the date of such appeal.

IX. And, further answering, defendant alleges that all moneys received by him from the plaintiff in respect of the importations in the complaint alleged to have been made were demanded of plaintiff and were by plaintiff voluntarily paid to him in his capacity as collector of customs as and for duties due the United States on imported merchandise, and were forthwith, before the commencement of this action and before the receipt by defendant of any protest or objection on the part of the plaintiff, paid over by the defendant, in his official capacity aforesaid, to the United States and placed beyond his control.

11 X. And, further answering, defendant alleges that all moneys received by him from the plaintiff in respect of the

importations in the complaint alleged to have been made were sums due from plaintiff to the United States as duties according to the rate of duty imposed by law upon articles of merchandise imported by plaintiff and assessed with duty, and no other sums than duties regularly assessed and ascertained and liquidated according to law upon plaintiff's entry thereof were collected or received by defendant from the plaintiff.

Wherefore defendant demands judgment that the complaint be dismissed with costs.

STEPHEN A. WALKER,
United States Attorney, Attorney for the Defendant.

(Endorsed:) 11312. U. S. circuit court, southern district of New York. Adolph Rossman *vs.* Edward L. Hedden, collector, etc. Answer. Stephen A. Walker, United States attorney, attorney for defendant. Due service of a copy of the within answer is hereby admitted. New York, Jan. 4, 1886. Hartley & Coleman, plaintiff's attorneys. To H. & C., plaintiff's attorneys.

12 At a stated term of the circuit court of the United States of America for the southern district of New York, in the second circuit, held at the United States court-rooms, in the city of New York, on Wednesday, the 5th day of December, in the year of our Lord one thousand eight hundred and eighty-eight.

Present: The Honorable E. Henry Lacombe, circuit judge.

ADOLPH ROSSMAN *vs.* EDWARD L. HEDDEN. } N. S. 11312.

Now comes the plaintiff, by Edward Hartley, his attorney, and moves the trial of this cause.

Likewise comes the defendant, by Henry C. Platt, assistant United States attorney, his attorney.

Thereupon a jury is empanelled and the cause proceeds to trial.

After hearing the evidence of the respective parties, the argument of the counsel, and the instructions of the court, the jury retire under charge of officers duly qualified to attend them, and upon their return say that they find a verdict for the defendant, and so they say all.

On motion of Edward Hartley, Esq., it is ordered that the plaintiff have a stay of sixty days in which to make and serve a case, with leave to turn the same into a bill of exceptions.

An extract from the minutes.

[L. S.] JOHN A. SHIELDS, *Clerk.*

13 United States Circuit Court, Southern District of New York.

ADOLPH ROSSMAN *vs.* EDWARD L. HEDDEN. } Judgment. February 5th, 1889.

The issues in this action having been brought on for trial before

Mr. Judge Lacombe and a jury, at a circuit court of the United States, October term, 1888, and the issues having been tried, and a verdict for the defendant having been duly rendered on the 12th day of December, 1888, and his costs having been adjusted at $46.85:

Now, on motion of Stephen A. Walker, United States attorney, for defendant, it is adjudged that the defendant have judgment against the plaintiff upon the issues in this action, and that he recover the sum of $46.85, his taxed costs, and have execution therefor.

Judgment signed this fifth day of February, 1889.

JOHN A. SHIELDS, *Clerk.*

14 [Endorsed:] 11312. United States circuit court. Adolph Rossman *vs.* Edward L. Hedden. Judgment-roll. Stephen A. Walker, United States attorney, attorney for defendant. Filed ——, 188–. Costs, $46.85. U. S. circuit court. Filed Oct. 5, 1889, 2.30 p. m. John A. Shields, clerk.

15 U. S. Circuit Court, Southern District of New York.

ADOLPH ROSSMAN
v.
EDWARD L. HEDDEN. } No. 11312.

Plaintiff's Bill of Exceptions.

Be it remembered that at the trial of this action, at the term of this court of October, 1888, before the Honorable E. Henry Lacombe, U. S. circuit judge, and a jury, the following proceedings took place:

The plaintiff was represented by his counsel, Hartley & Coleman, and the defendant by his counsel, Henry C. Platt, assistant U. S. district attorney.

The plaintiff introduced testimony showing the importation by him at the port of New York, in the year 1886, of certain tiles, as shown by the bill of particulars in this action.

Upon these importations the defendant, as collector of customs, levied and collected duty at 55 % under the provisions in Schedule B of the tariff act of March 3, 1883, for "all other earthen, stone, and crockery ware, white, glazed, or edged, composed of earthy or mineral substances, not specially enumerated or provided for in this act."

The plaintiff in due season protested and appealed to the Secretary of the Treasury, and brought suit within the time pre-
16 scribed by law for the recovery of the excessive duties. The ground of his objection stated in his protest was, as to the Furnessia, of May 25, 1886, that said tiles were dutiable at 35 % ad valorem, under section 2499, Rev. Stats., by similitude to encaustic tiles, provided for in Tariff Schedule B. Duty was exacted on the goods by the Furnessia upon entry at the rate of 55 % ad valorem. As to the goods per the Canada and Rhaetia, the claims in plaintiff's protests were that they were dutiable at 20 % ad valorem, under Tariff Schedule B, as paving tile, directly or by virtue of section

2499, Rev. Stats. If not so dutiable, then they should pay 35 %, by similitude to encaustic tiles, under said section and schedule.

Testimony was further given showing that upon the entry, *ex* Canada, Feb'y 24, '86, a portion of the duty was paid on the 26th day of February, 1886, and the remainder on the 10th day of May, 1886. The only goods in this suit upon said entry were two packages of tiles, marked D. F. & T., 25306, 25307, on which duty was taken on entry at 35 % ad valorem, the same being entered as encaustic tiles; that both of said packages were delivered to the plaintiff on or before March 18, 1886; that duties on said entry to the amount of $126.10 were paid February 26, 1886 (the date of said entry), and an increased duty of $14.30 (total, $140.40), was paid May 10th, 1886.

The bill of particulars claimed, as an excess of duty on this entry, $12.20.

The plaintiff had possession of all of the goods in suit on this entry on or before March 18, 1886.

17 Testimony was further given that all the tiles in dispute were called in trade plain glazed and plain enamelled tiles.

Those having the color in the glaze are termed enamelled, and those having the color in the body are termed plain glazed.

The goods were described in the plaintiff's entries as follows:

1. By the Canada, February 26th, 1886:

Two packages encaustic tiles.

2. By the Furnessia, May 25, 1886:

Eight casks plain white tiles.

3. By the Rhaetia, June 4th, 1886:

Eight hogsheads one case earthenware tiles.

The invoice by the Furnessia described the goods as glazed earthenware tiles.

A witness of long experience in dealing in tiles, after testifying to their use on March 3, 1883, and prior thereto, was asked by plaintiff's counsel:

Q. Is their use since any different from what it was before?

Objected to as immaterial, and objection sustained by the court; to which plaintiff's counsel then and there excepted.

The witness was further asked by plaintiff's counsel:

Q. Will you state now whether at the present time those tiles are not extensively used for paving bath-room floors?

Objected to as immaterial, and objection sustained; to which
18 ruling the plaintiff's counsel then and there excepted.

Another dealer in tiles of long experiance, having testified to the use of the tiles in dispute prior to March 3, 1883, was asked by plaintiff's counsel:

Q. For what purposes are they used now?

Objected to by defendant's counsel as immaterial, and excluded by the court; to which ruling plaintiff's counsel then and there excepted.

Q. For what purposes are they intended to be used now?

Which was also objected to as immaterial, excluded, and an exception then and there taken by plaintiff's counsel.

Q. For what purposes are they imported?

Which in like manner was objected to as immaterial and excluded and an exception to this ruling of the court was then and there taken by plaintiff's counsel.

Testimony was given on the part of the plaintiff by dealers in tiles of long experience that on March 3, 1883, and immediately prior thereto, the tiles in suit were used in this country to lay down in cement in vestibules, on hearths, bath-room floors and walls, on kitchen floors under sinks, interspersed with unglazed tiles on floors, in church chancels, conservatories, hospital floors and walls, and generally in places where either a non-absorbent cleanly tile was required or where there was little wear and tear and a particularly ornamental effect was desired.

Testimony was also given on the part of the plaintiff by importers and large dealers in tiles of many years experience that at the date of the passage of the act of March 3, 1883, the term paving
19 tile had no meaning in the trade and commerce of this country different from its ordinary meaning and meant tiles used for paving, and gave evidence tending to show that plaintiff's importations per Canada and Rhaetia were such tiles.

Testimony was also given on the part of the plaintiff by architects of long experience in this country that plaintiff's tiles were used for paving purposes; that tiles used for hearths were considered paving tiles; that the hearth architecturally was a part and an extension of the floor, and that a paving tile was a tile made to be laid horizontally and flat and intended so to be used.

It appeared, however, that the principal use of the tile imported per Furnessia, represented at the trial by sample Exhibit No. 5, was for walls, though sometimes used for hearths, bath-room floors, and under kitchen sinks and other places at the date of the passage of the act of March 3, 1883; that it was used for the same general purposes as glazed encaustic tiles.

That encaustic tiles consist of two varieties, glazed and unglazed, the unglazed being generally used for floors and hearths and the glazed being generally used on walls, though sometimes for hearths and other places.

Testimony was also given on the part of the plaintiff by large dealers in earthenware of long experience that the term "earthenware" as used in the trade and commerce of this country does not and did not at the date of the passage of the tariff act of March 3d, 1883, include tiles of any kind, but referred principally to
20 tableware and pottery.

It further appeared that all the tiles in suit and all paving and encaustic tiles described in Tariff Schedule B are made of clay, all baked in kilns, and generally made by the dust process from pulverized clay moulded under pressure in a dry state.

Witnesses on the part of the defendant, including manufacturers of tiles, officers of tile companies, dealers, and salesmen of tiles, tile designers and architects, all of large and long experience, testified that the term paving tile had a well-known designation and definition in the trade and commerce of this country on March 3d, 1883, and prior thereto, and referred to an unglazed, hard-baked tile used for flooring purposes, and that the term paving tile and flooring tile at that time were interchangeably used to denote the same kind of a tile; that the tiles in suit were made of a different kind of clay from the so-called paving tile; that the body of the plaintiff's tiles in suit was softer, more porous, and a more expensive body than the body of a paving tile; that the body of the tiles in suit was composed of china clay, Cornwall stone and flint, and some other materials, costing from $15 to $22 a ton, while the clay used in the manufacture of paving tile is a different and cheaper kind of clay, worth 1.50 a ton, and is not porous and not absorbent, and which body is baked hard to stand the wear and tear of being trod or walked upon;

that paving tiles were used to be walked and trod upon where
21 there was wear and tear, and that the tiles such as plaintiff's were used for walls, facings, dadoes, and decorative purposes, and sometimes used in modern hearths, which are protected by a fender and raised from the floor and not to be walked upon and are considered part of the mantels and grates and not as a part of the floor; that such tiles as plaintiff's have been used somewhat for hearths since March 3, 1883, and were not used to any extent on hearths prior to March 3d, 1883.

That the tiles in suit were not adapted for any wear and tear, and would be dangerous to walk upon on account of their slippery surface, and easily become broken if used for flooring purposes, except for ornament on floor borders. That encaustic tiles are made of several kinds of clay instead of one only, with the colors burned in.

That encaustic tiles are both glazed and unglazed; that the unglazed encaustic were sometimes used for flooring purposes, and the glazed encaustic were for ornamental purposes, and for walls, dadoes, and facings.

The tiles are now generally made by the dust process, dry clay being subjected to great pressure in molds, and then baked; that the paving tiles are baked once, the glazed or enamelled tiles are baked twice; that the modern hearth is about eighteen or twenty inches wide, guarded by a brass or iron fender, and is not used to be walked upon, and that such hearth is not considered by architects to be a part of the floor.

The testimony of a potter of very long experience tended to
22 show that in his experience these articles were earthenware.

During the course of the trial the court ruled as follows:

"I don't think there is room for the similitude doctrine, and that may be borne in mind by the jury. I shall tell the jury that whether it bears a similitude to paving tile is not to be considered by them. There will only be a single question for them, whether they are paving tiles or not."

Plaintiff's counsel then and there excepted to the foregoing ruling on the ground that there is testimony in this case that the term earthenware is confined in the statute to a variety of articles and does not have its general force and significance, and that testimony should go to the jury.

The court thereupon charged the jury, among other things, as follows:

"In the first place, as to the importation by the Canada, as I have before intimated, your verdict must be for the defendant, for the reason that the payment was not in fact made to obtain possession of the goods."

To which the plaintiff's counsel then and there excepted.

"With regard to the importation by the Furnessia, the protest of the plaintiff restricted him to a single claim, to wit, that these goods were similar in uses, quality, material, and texture to encaustic titles, and should therefore pay the same duty as that paid by encaustic tile. In the view which I take of the similitude clause and, guided by the decisions, of Smith *v.* Field, 105 U. S., 53; Sussfeld *v.*
23 Arthur, 96 U. S., 128, and Arthur *v.* Butterfield, 125 U. S., 70, I shall, as to the importations by that particular vessel, direct a verdict for the defendant."

To which the plaintiff's counsel then and there excepted.

"There is then left for your consideration only the importation by the Rhaetia."

The old English word "ware," with which you are familiar in the combination of hardware, tinware, &c., is a comprehensive word. It is defined by Worcester and Webster as "goods, commodities, merchandise," and in the same dictionaries the term "earthenware" is defined as ware made of earth or clay.

Reading for the word "ware" the definition which the dictionary gives for it, we will find as the definition of "earthenware" "goods, commodities, or merchandise made of earth or clay.

"That, you see, is a very general, broad, and comprehensive word, and it was evidently used by Congress in that same sense, for we find the word "earthenware" used as the heading of a schedule which contains articles as dissimilar as a porcelain teacup, a Parian vase, a fire-brick, and a slate pencil."

To which plaintiff, by his counsel, then and there excepted.

"It is sufficiently broad, this word earthenware, to cover tiles, to cover the articles imported by the plaintiff here as they appear and have been described by the witnesses; therefore, unless they are covered by some other provision of the tariff act, they must
24 be held dutiable as earthenware and the determination of the collector in that respect sustained."

To which the plaintiff, by his counsel, then and there excepted.

Plaintiff's counsel then and there "prayed the court to submit to the jury specifically the evidence in the case whether or not the term 'earthenware' had, in March, 1883, and prior thereto, a confined meaning in the trade and commerce of this country."

Which request the court thereupon refused to grant; to which refusal the plaintiff, by his counsel, then and there excepted.

The plaintiff's counsel then requested the court to charge the jury as follows, viz:

"That if they find the goods represented by sample 5 to be substantially the same article as encaustic tiles, commercially, and to be used for the same purposes, they must find for the plaintiff."

Which request the court then and there refused; to which refusal the plaintiff's counsel then and there excepted.

The plaintiff's counsel then requested the court to charge the jury as follows, viz:

"That if they find that at the date of the passage of the tariff act of 1883 the term earthenware had, in the trade and commerce of this country, acquired a meaning exclusive of tiles, then it is immaterial that tiles are made of earthenware, and tiles are primarily not earthenware of any kind under said act for duty purposes."

25 Which request the court then and there refused; to which refusal the plaintiff's counsel then and there excepted.

The plaintiff's counsel then requested the court to charge the jury as follows, viz:

"That if they find the tiles imported per Canada and Rhaetia to be non-enumerated in the tariff act, but bearing a similitude, in material, quality, texture, or the use to which it may be applied, to paving tiles, and a greater similarity to them than to any other enumerated articles, they must find, as to such tiles, for plaintiff."

Which request the court then and there refused; to which refusal the plaintiff's counsel then and there excepted.

The plaintiff's counsel then requested the court to charge the jury as follows, viz:

"That if the jury find the tiles represented by sample number 5 are non-enumerated in the tariff and bear a similitude, in material, quality, texture, or the use to which they are applied, to glazed encaustic tiles, and a greater similitude in such respects than to any other enumerated article, they must as to them find for the plaintiff."

Which request the court then and there refused; to which refusal the plaintiff's counsel then and there excepted.

And afterwards the jury retired to consider of their verdict, and, returning, rendered a verdict for the defendant.

And because the matters and proceedings aforesaid do not otherwise by the record appear, the said judge hath settled, allowed, signed, and sealed this bill of exceptions at the *at the* aforesaid

26 term of October, 1888, to wit, this 25th day of January, 1889, and ordered the same to be filed.

E. HENRY LACOMBE, *Judge.*

We hereby agree to the foregoing as and for the bill of exceptions in this action, and request that it be signed and filed.

Jan'y 25, '89.

STEPHEN A. WALKER,
U. S. Att'y, for Def't.
HARTLEY & COLEMAN,
P'f's Att'ys.

27 [Endorsed:] U. S. circuit court, southern dist. of New York. Adolph Rossman *v.* Edward L. Hedden. Plaintiff's bill of exceptions. Hartley & Coleman, counsel for pl'ff, 62 Wall street, New York city. U. S. circuit court. Filed Jan'y 23, 1889. John A. Shields, clerk.

28 U. S. Circuit Court, Southern District of New York.

ADOLPH ROSSMAN
v.
EDWARD L. HEDDEN. } No. 11312.

And now comes the above plaintiff, by Hartley and Coleman, his attorneys, and shows the court that the amount of the judgment herein in favor of the defendant, as appears by the judgment-roll, is forty-six $\frac{85}{100}$ dollars; that the plaintiff proposes to sue out a writ of error herein to remove the cause to the U. S. Supreme Court, where, according to the rules of said court, security must be given by him for the costs of said court, and where in the regular order of business it will be heard and determined in less than three years.

Wherefore he proposes to pay into the registry of this court the sum of one hundred dollars as sufficient security to the defendant that he will prosecute his said writ of error to effect and will pay all damages and costs if he fails to reverse the judgment aforesaid; said sum of one hundred dollars to be hereafter paid out upon the order of the court as it may be found due.

Now, therefore, it is ordered that such payment into the registry of this court shall be good and sufficient security upon said writ of error and the citation thereunder.

E. HENRY LACOMBE, *Judge.*

29 I consent.

STEPHEN A. WALKER,
U. S. Att'y & Att'y for Def't.

Received into the registry of this court from the plaintiff in this action one hundred dollars, in accordance with the foregoing order.

Dated New York, Feb'y 7, 1889.

JOHN A. SHIELDS, *Clerk.*

(Endorsed:) U. S. circuit court, southern district of N. Y. A. Rossman *v.* E. L. Hedden. Order for security on writ of error. Hartley & Coleman, pl'f's att'ys, 62 Wall St., New York city. U. S. circuit court. Filed Feb. 7, 1889. John A. Shields, clerk.

30 Supreme Court of the United States.

ADOLPH ROSSMAN, Plaintiff in Error,
vs.
EDWARD L. HEDDEN, Defendant in Error. } Assignment of Errors.

Afterwards, to wit, on the second Monday of October, in the same term, before the justices of the said court, at the Capitol, in Washington, comes the said plaintiff in error, by Edward Hartley and

Walter H. Coleman, his attorneys, and says that in the record and proceedings aforesaid there is manifest error, in this, to wit: that by the record aforesaid it appears that the judgment aforesaid, in form aforesaid given, was given for the said defendant in error against the said plaintiff in error, whereas, by the law of the land, the said judgment ought to have been given for the said plaintiff against the said defendant.

And the said plaintiff prays that the judgment aforesaid, for the error aforesaid and other errors in the record and proceedings aforesaid, may be reversed, annulled, and altogether held for nothing, and that he, the said plaintiff, may be restored to all things which he has lost by occasion of said judgment, &c.

EDWARD HARTLEY.
WALTER H. COLEMAN.

31 [Endorsed:] 11312. United States Supreme Court. Adolph Rossman, plaintiff in error, *vs.* Edward L. Hedden, defendant in error. Assignment of error. Hartley & Coleman, attorneys for p'f in error. Due service of a copy of the within assignment of error is hereby admitted this 7th day of Feb'y, 1889. Stephen A. Walker, attorney for def'd't in error. To —— ——, attorney for — in error. U. S. circuit court. Filed Feb. 7, 1889. John A. Shields, clerk.

32 Supreme Court of the United States, October Term, 1889.

ADOLPH ROSSMAN, Plaintiff in Error,
v.
EDWARD L. HEDDEN, Defendant in Error.

And afterwards, to wit, on the second Monday of October, in the same term, the said Edward L. Hedden, defendant in error, by Stephen A. Walker, U. S. attorney, his attorney, comes here into court and says there is no error, either in the record or proceedings aforesaid or in the giving of the judgment aforesaid, and he prays the said Supreme Court may proceed to examine, before the justices thereof now here, as well the record and proceedings aforesaid as the matter aforesaid above assigned for error, and that the
33 judgment aforesaid, in form aforesaid given, may be in all things affirmed, &c.

STEPHEN A. WALKER,
Attorney for Defendant in Error.

(Endorsed:) U. S. Supreme Court. A. Rossman *v.* E. L. Hedden. Joinder in error. Due service of a copy hereof is hereby acknowledged this 7th day of February, 1889. Hartley & Coleman, pl'ff's att'ys. U. S. circuit court. Filed Feb'y 7th, 1889. John A. Shields, clerk.

34 UNITED STATES OF AMERICA, *ss:*

To Edward L. Hedden, Greeting:

You are hereby cited and admonished to be and appear at a Su-

preme Court of the United States, to be holden at Washington on the second Monday of October, eighteen hundred and eighty-nine, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the southern district of New York, wherein Adolph Rossman is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Dated New York, Feb'y 6th, 1889.

E. HENRY LACOMBE.

35 [Endorsed:] E. & A. A. 805. 11312. U. S. Supreme Court. Adolph Rossman, plaintiff in error, against Edward L. Hedden, defendant in error. Citation. Hartley & Coleman, attorneys for plaintiff in error. Due service of a copy of the within citation is hereby admitted this 7th day of Feb'y, 1889. Stephen A. Walker, attorney for defendant in error. U. S. circuit court. Filed Feb. 7, 1889. John A. Shields, clerk.

Endorsed on cover: Case No. 13,497. S. New York C. C. U. S. No. 332. Adolph Rossman, plaintiff in error, *vs.* Edward L. Hedden, late collector of the port of New York. Filed February 26th, 1889.

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U. S. Supreme Court.

ADOLPH ROSSMANN,
Plaintiff in Error,

AGAINST

EDWARD L. HEDDEN.

October Term, 1891.
No. 332.

Statement.

This action is to recover duties paid under protest.

Rossmann imported in 1887 three lots of tiles on which the Collector at New York collected duty at 55% under Schedule B of the Tariff Act of March 3, 1883, as upon "all earthen stone and crockery ware white, "glazed or edged composed of earthy or mineral sub- "stances, not specially enumerated or provided for in "this act" (22d Stats., 495).

The protest upon two lots (per "Canada" and "Rhaetia") claimed them dutiable at 20% under said schedule, as "paving tile" directly, or by similitude under Section 2499 Revised Statutes, or, failing that, at 35 % under said schedule and section by similitude to encaustic tiles (22 Stats., 491–495).

The protest upon the third lot (per "Furnessia") claimed them dutiable at 35 % under Section 2499 Revised Statutes, by similitude to "encaustic tiles," pro-

vided for in said Schedue B, which is the alternative claim of the other protest (Record, p. 7).

On the entry per "Canada" a verdict for defendant was directed, on the alleged ground that "the payment was not in fact made to obtain possession of the goods." Plaintiff denied the fact and excepted. The record shows that duties on two packages of tiles were paid at 35% on entry (Feb. 26, 1886); that afterwards (March 18, 1886) the goods were delivered to the importer, and after that again (on May 10, 1886) an increased duty of $14.30 was paid on the entry. Having originally paid duty at 35% to get his goods, and before the delivery thereof, he claimed that he was entitled to maintain his suit for the difference between 35% and 20%, which latter rate he alleged to be the true one under the first clause of his protest (Record, p. 8 to p.).

At the trial testimony was given for plaintiff, that the word "paving tile" had no meaning at the date of the passage of the Tariff Act of 1883 in trade and commerce different from its ordinary meaning, and that the term meant tiles used for paving, and tending to show that the importations per "Rhaetia" and "Canada" were of such tiles (Record, p. 9).

And plaintiff claimed that if his tiles were used principally for paving when imported and since the passage of the act, that he was entitled to prove that fact, and after examining witnessess upon the use of his tiles before the passage of the Act of March, 1883, he inquired about their use for paving since that time.

The evidence was excluded and plaintiff excepted (Record, p. 8 below middle, and 9 top).

This excluded any evidence of the use of the tiles in suit after the date of the passage of the Act of March 3, 1883.

The Court also directed a verdict for the defendant on the importation by the "Furnessia," holding that the question raised by the protest was under Section

2499 Revised Statutes, whether the tiles were similar in either material, quality or use to encaustic tiles, and that the law did not apply (Record, p. 11, fols. 22 and 23).

The ruling was that they were "earthenware," *i. e.*, ware made of earth, and thus "*enumerated*" (Record, fol. 23).

Plaintiff excepted and asked to have submitted to the jury the evidence in the case that at the date of the passage of the Act of March 3, 1883, the term earthenware was one of trade, and did not then or now as used in the trade and commerce of this country include tiles of any kind, but referred principally to table crockery and pottery.

The following extract from the record especially bears upon the "Furnessia" shipment and the question of similitude, viz.: "It appeared, however, that the principal use of the tile per 'Furnessia' represented at the trial by sample Exhibit No. 5, was for walls, though sometimes used for hearths, bath-room floors, &c.; that it was used for the same general purposes as glazed encaustic tiles.

"That encaustic tiles consist of two varieties, glazed and unglazed; the unglazed being generally used for floors and hearths, and the glazed being generally used on walls, though sometimes for hearths and other places."

This testimony was not controverted, and the facts are stated in the record as having "appeared" (Record, fol. 19).

"Testimony was also given on the part of the plaintiff, by large dealers in earthenware of long experience, that the term earthenware, as used in the trade and commerce of this country, does not and did not at the date of the passage of the Tariff Act of March 3, 1883, include tiles of any kind, but referred principally to tableware and pottery.

"It further appeared that all the tiles in this suit

and all paving and encaustic tiles described in Tariff Schedule B are made of clay, all baked in kilns and generally made by the dust process from pulverized clay molded under pressure in a dry state" (Record, fols. 19, 20).

All evidence whatever of similitude to paving tiles as well as to encaustic was withdrawn from the jury under exception, and the only question left to them was whether the goods in the shipment per "Rhaetia" were paving tiles (Record, fol. 22).

The several rulings of the Court on the meaning of the term "earthenware," his refusal to submit to the jury the evidence upon the commercial meaning of the term, his refusal to leave to the jury the question of similitude on the evidence if they found the tiles in suit to be non-enumerated articles, were raised and excepted to in various forms at the trial.

Assignments of Error.

Plaintiff assigns for error:

1st. The refusal of the Court below to allow the following questions to be put to the jury concerning the use of the tiles imported since the date of the passage of the Tariff Act of 1883:

Is their use since any different from what it was before?

2d. Will you state now whether, at the present time, those tiles are not exclusively used for paving bath-room floors?

3d. For what purposes are they used now?

4th. For what purposes are they intended to be used now?

5th. For what purposes are they imported?
Record, folios 17 and 18.

6th. The ruling of the Court during the course of the trial: "I don't think there is room for the similitude "doctrine, and that may be borne in mind by the jury. "I shall tell the jury, that whether it bears a similitude "to paving tile is not to be considered by them. There "will only be a single question for them, whether they "are paving tiles or not."
Record, folio 22.

7th. In directing a verdict for defendant on the importation per "Canada," on the alleged ground "that "payment was not in fact made to obtain possession of "the goods."
Record, folio 22.

8th. In directing a verdict for defendant on the importation by the "Furnessia," viz.: "With regard to the importation by the 'Furnessia' the protest of the plaintiff restricted him to a single claim, to wit, that these goods were similar in uses, quality, material and texture to encaustic tiles, and should, therefore, pay the same duty as that paid by encaustile tile. In the view I take of the similitude clause, and guided by the decisions of Smith vs. Field, 105 U. S., 53; Sussfeld vs. Arthur, 96 U. S., 128, and Arthur vs. Butterfield, 125 U. S., 70, I shall, as to the importations by that particular vessel, direct a verdict for the defendant.

9th. In charging the jury as follows, viz.: "Reading for the word ware, the definition which the dictionary gives for it, we will find as the definition of 'earthenware' goods, commodities, or merchandise made of earth or clay.

"That, you see, is a very general, broad and compre-

hensive word, and it was evidently used by Congress in that same sense." * * *

10th. In charging the jury

"It is sufficiently broad, this word earthenware, to cover tiles, to cover the articles imported by the plaintiff. * * * Therefore, unless they are covered by some other provision of the Tariff Act, they must be held dutiable as earthenware, and the determination of the Collector in that respect sustained."

Record, folio 23.

11th. In refusing to submit to the jury specifically the evidence in the case whether or not the term earthenware had in March, 1883, and prior thereto, a confined meaning in the trade and commerce of this country.

12th. In refusing to charge the jury as follows, viz.: That if they find that at the date of the passage of the Tariff Act of 1883 the term earthenware had in the trade and commerce of this country, acquired a meaning exclusive of tiles, then it is immaterial that tiles are made of earthenware and tiles are primarily not earthenware of any kind, under said act, for duty purposes.

Record, folio 24.

13th. In refusing to charge the jury as follows, viz.: That if they find the tiles imported per "Canada" and "Rhaetia" to be non-enumerated in the Tariff Act, but bearing a similitude in material, quality, texture or the use to which it may be applied to paving tiles, and a greater similarity to them than to any other enumerated articles they must find as to such tiles for plaintiff.

Record, folio 25.

14th. In refusing to charge the jury as follows, viz.: That if the jury find the tiles represented by sample

number 5 are non-enumerated in the Tariff, and bear a similitude in material, quality, texture or the use to which they are applied to glazed encaustic tiles, and a greater similitude in such respects than to any other enumerated article, they must as to them find for the plaintiff.

Record. folio 25.

15th. In refusing to receive evidence of the use of plaintiff's tiles since March 3, 1823.

16th. In directing a verdict for defendant on the importation per "Canada."

17th. In directing a verdict for defendant on the importation per "Furnessia."

18th. In excluding all evidence of similitude from the jury.

ARGUMENT.

1.

It appears plainly from the record as *matter of fact* that the Court below was wrong in deciding that "payment of the duties was not in fact made to obtain possession of the goods" per Canada.

On entry, duties were taken at 35 per cent. February 26, 1886, and the delivery of the goods was not made until March 18, 1886 (Record, page 8, near top). The protest claimed that the goods were dutiable at 20 per cent. as the first ground thereof (Record, page 7, bottom.)

The plaintiff, therefore, claims that his payment comes within the exact language of R. S., 3011, under

which statute and not under common law he must recover, if at all.

Arnson vs. Murphy, 109 U. S., 238.

The payment at 35 per cent. having been made under protest, and also "in order to obtain possession of the merchandise, is exactly under U. S. vs. Schlessinger, 120 U. S., 109, 113, top, and Porter vs. Beard, 124 U. S., 433, top.

The error of the Court below was in assuming that we claimed to recover the additional duty of $14.40 paid February 26, 1888. We make no such claim. Our claim is on the first payment of duty on February 26, 1888, and no other, when we paid duty at 35 per cent., of which 15 per cent. was claimed to be illegal by our protest, and to which extent alone we can recover.

II.

The Court erred in excluding evidence of the use of plaintiff's tiles subsequent to the date of passage of the Act of 1883.

The use to which an article is applied is an important factor in tariff classification.

Koch vs. Seeburger, 30 Fed. Rep., 424.
U. S. vs. Washington Mills, 2 Clifford, 601.
Rev. Stat., § 2499.
Fisk vs. Arthur, 103 U. S., 431.

There are two general classes of terms used in tariff acts identifying articles for duty, which may be known as denominative terms and descriptive terms.

Solomon vs. Arthur, 102 U. S, 211, 212;
Reiterated and approved in Robertson vs. Glenden-ning, 132 U. S. 159, 160.

The names articles bear in trade are commercially denominative, and the rule of law is that they are to be taken with the meaning they bore at the date of the passage of the act imposing duty upon them.

Congress acting (then) *in præsenti* is presumed, in the absence of a contrary intention legitimately appearing, to have levied its duty on a distinct and specific thing then known under the appellation it bore in our markets. There are grave reasons why this is so: Names may be wrested from their original signification by the changes of trade and cover something that the legislators designed to pay another duty; and colorable changes may be made in the article itself by fraudulent design to escape the impost.

But when an article is dutiable *descriptively*, or according to its *material or use*, the reasons for limiting the imposition to articles that were then used for the purposes and made of the materials named in the statute do not apply, for use and material are the tests of the duty and not the thing itself. The officer levying the duty must decide what is the use of the article when he acts, not what it might have been used for when the Tariff Act passed.

Mason vs. Robertson, 139 U. S., 627, below middle.
Smith vs. Field, 105 U. S., 52.

The word paving tile is a term of general description according to use, it meaning tile for paving. The language of the statute is "roofing and paving tile." When Congress used the words it did not intend that tiles for roofing should be under any circumstance paving tile or *vice versa*.

The descriptions roofing and paving tile are so familiar in common use and in the daily speech of people that no one trade can appropriate or trade-mark them. They belong to the public, like wearing ap-

parel and "glass-cut," long ago passed upon in this Court.

Maillard vs. Lawrence, 16 How., 251–260.
Binns vs. Lawrence, 12 How., 9.

Taking these terms as illustrations, it would be quite ridiculous to insist that Congress intended by the term wearing apparel only such articles of dress as were worn at the date of the passage of the act, and by the term glass-cut only such articles of glass as were cut at that time.

In laws imposing taxes Congress frequently looks to the future, and new articles non-existent at the time of the law are provided for.

Pickhardt vs. Merritt, 132 U. S., 252–257.
Cheney vs. Van Arsdale, 15 Wall., 68–74.
Newman vs. Arthur, 109 U. S., 132–138, bottom.
Lottimer vs. Lawrence, 1 Blatch, 613, 614.

If there be doubt whether the term paving tile is a commercial term, or used in its ordinary signification, we having already introduced evidence to show that the term was not used in the trade at and prior to the Act of 1883 except in its common meaning, as embracing tiles used for paving, the evidence of the use of our tiles since 1883 was proper and the Court erred in excluding it.

Lawrence vs. Allen, 7 Howard, 785–797.
Tyng vs. Grinnel, 92 U. S., 467–470 bottom.
Smith vs. Field, 105 U. S., 52.

III.

The Court erred in refusing to submit the question of similitude to the jury.

The record (fols. 19 and 20) shows, on the "Furnessia" importation, that the tiles were for walls, though sometimes for hearths and bath-room floors, and that they "used for the same general purposes as glazed encaus-" tic tiles. * * *

"Testimony was also given on the part of the plaint-" iff, by large dealers in earthenware of long experience, " that the term 'earthenware,' as used in the trade " and commerce of this country, does not and did not " at the date of the passage of the Tariff Act of March " 3, 1883, include tiles of any kind, but referred prin-" cipally to tableware and pottery.

"It further *appeared* that all the tiles in suit, and " all paving and encaustic tiles described in Tariff " Schedule B, are made of clay, all baked in kilns and " generally made by the dust process from pulverized " clay molded under pressure in a dry state."

The evidence of similitude in material and use here is uncontradicted, and is stated as having "appeared."

And evidence being given tending to show that "earthenware" was a trade term and did not cover our goods, there being no claim that they were enumerated anywhere else, it was error to hold that the "Furnessia" goods were enumerated as earthenware and to direct a verdict for the defendant on that importation.

The question of similitude is for the jury.

Herman vs. Arthur, 127 U. S., 363, 370.

"It is a cardinal rule of this Court that in fixing the " classification of goods for the payment of duties, the " name or designation of the goods is to be understood " in its known commercial sense, and that their denom-" ination in the market when the law was passed will

"control their classification, without regard to their "scientific designation, the material of which they "may be made or the use to which they may be ap-"plied."

American Net & Twine Co. vs. Worthington, 141 U. S., 468; quoting numerous authorities.

That being so, the Court could not say, as matter of law, that the word earthenware was used in its alleged common meaning, when there was evidence, practically uncontradicted, that it was a commercial term and did not cover our goods, for it is equally well settled that "it is a proper fact for the jury to decide whether the "imported article is or is not known in commerce by "the words or terms used in the Tariff imposing the "duty and not a question of law to be settled by the "Court, as was done here."

Lawrence vs. Allen, 7 How., 785, 797; citing many cases.
Tyng vs. Grinnell, 92 U. S., 467, 470.
Smith vs. Field, 105 U. S., 52.

IV.

The Court erred in charging as matter of law as follows, viz.:

"It is sufficiently broad, this word earthenware, to "cover tiles, to cover the articles imported by the "plaintiff here as they appear and have been described "by the witnesses; therefore, unless they are covered "by some other provision of the Tariff Act, they must "be held dutiable as earthenware and the determina-"tion of the Collector in that respect sustained."

To this plaintiff excepted and "prayed the Court to

"submit to the jury specifically the evidence in the "case, whether or not the term earthenware had in "March, 1883, and prior thereto, a confined meaning "in the trade and commerce of this country," which the Court refused to do and plaintiff again excepted (Record, folios 23 and 24).

This ground of error in another form was considered as a matter of pure law in the last point, but we wish to show that, in the haste of the trial, the Court below fell into grievous errors of fact, and also that all tariff history and the practice of the Treasury Department is against him.

The word "ware" is not, as stated by the Court, a comprehensive word, synonym of goods, commodities, merchandise.

The plural form "wares" is so, for we say "goods, wares and merchandise," never goods, WARE and merchandise.

"Ware" means commodities of a particular kind; it is a term practically obsolete, except in the compound or hyphenated form, as in hardware, hollow-ware, wooden-ware, stone-ware, tin-ware, earthenware. These words are all commercial terms, not importing what they profess on their face, but requiring evidence from the trade in which they are bought and sold to tell what they are. So earthenware does not mean *wares* made of earth, any more than hollow-ware means commodities that are hollow, or hardware commodities that are hard, but it does mean a particular commodity made of earth, *i. e.*, crockery, pottery as defined by the trade and in standard dictionaries, and we submit with great confidence that such terms as *earthenwares*, *hollow wares* and *hardwares* are never used. These observations give to the definition in Webster's Dictionary—"Earthenware": "*Ware* made of earth, CROCKERY," a plain and sensible signification. McElrath's Commercial Dictionary—"Earthenware": "The ordinary classes of cheap

" crockery and pottery were made of earth or clay used " for domestic purposes. Porcelain pottery and " crucibles are frequently included under the general " term of earthenware."

The term earthenware is used in the body of Schedule B, not under the definition of the Court below, which would include clay pipes, plaster of paris and putty, but nearer the definition of McElrath—domestic pottery.

The terms " brown earthenware, common stoneware, " china, porcelain, parian, bisque, earthen, stone and " crockery ware," are trade terms and subdivisions of earthenware. This is further shown by the words " including plaques, ornaments, charms, vases and statuettes, " &c., which are here made " *ware* " by Act of Congress. The application of the maxim " *Expressio unius est exclusio alterius* " would exclude tile, and therefore the Secretary of the Treasury, in December, 1886, asked Congress to amend it by inserting the word " tiles," which it did not do (see Appendix No. 1).

The Jacoby Case, 103 U. S., 677, decided that an article of china or porcelain in material was not *necessarily* an article of chinaware, but a painting, although " the colors used were metallic and that the " pictures were baked to make the colors more firm," that is, though made as decorated china is made. The unreported case of Tiffany vs. Morritt, in November, 1881 (see Appendix 2), holding that painted plaques were not earthenware, although entirely earthenware in material, was an extension of this judgment. To avoid the effect of these decisions, the Secretary of the Treasury procured the insertion in the earthenware clauses of the present Tariff the clause " including plaques," &c., just as he recommended in his annual report to Congress in December, 1886, the insertion of the word " tiles " in the same connection.

If Congress had intended that the residuary clause " all other earthen, stone and crockery ware, white, " glazed or edged, composed of earthy or mineral sub- " stances, not specially enumerated or provided for in this

"act," should embrace *any manufacture* of earthy or mineral material *n. o. p.*, the language would have been manufactures composed of earthy or mineral substances, and the restrictive trade terms earthenware, stoneware and crockeryware would not have been used.

The words "stoneware above the capacity of ten gallons" show that all stoneware must have capacity to hold contents, otherwise it could not be graded by gallon measures.

Clearly this language is technical and not according to the common meaning.

Here the earthenware part of the schedule ends, and it is exhaustive. Next comes a class of articles used in building, which are not earthenware commercially, most of which are not necessarily, and some never, of earthen material. These are tiles, bricks and slate. Then follow glass and its manufactures, making in the schedule distinct groups: (1) earthenware; (2) tiles, brick and slate; (3) glass and glass articles.

This arrangement has only been since the present tariff. Tiles and brick were not in Schedule B of the Revised Statutes (Earthenware), but they were in Schedule M (Sundries). The earthenware, slate and glass parts of Schedule B came into the revision from Sec. 9 of the Act of June 30, 1864, 13 Stats., 210. The provision for encaustic tiles from Sec. 22, Act March 2, 1861, and Sec. 13, Act July 14, 1862, 12 Stats., 191, 556; and for brick, fire-brick and roofing and paving tiles from Sec. 20, Act of March 2, 1861, 12 Stats., 189.

Comparing Sec. 17, Act of March 2, 1861, 12 Stats., 186, 187, with Schedule B, we find glass provided for as first, and earthenware as second; the tile and brick provisions being in another part of the act, altogether making three distinct groups.

The following résumé of tariff legislation since 1842 will show that tiles and earthenware are, first, in its purview, *different things*, and, second, that tiles are always associated with bricks as similar things.

Act August 30, 1842, 5 Stats., 554, middle, 5th: On chinaware, porcelain ware, earthenware, stoneware and all other ware composed of earth or mineral substances not otherwise specified, whether gilt, painted, printed, plain or glazed, a duty of thirty per cent. *ad valorem*; and on page 556, middle, 12th, on slates of all kinds, paving tiles and bricks, twenty-five per centum *ad valorem*."

Act July 30, 1846, 9th Stats., 45, Schedule A.: thirty per cent. on * * * "earthen, china and stone ware and all other wares composed of earthy or mineral substances n. o. p. f.; page 47, Schedule E X, twenty per cent. on "paving stones, paving and roofing tiles and bricks."

Act March 2, 1861, Sec. 17, 12 Stats., 186, Second. On china and porcelain ware of all descriptions thirty per centum *ad valorem*; on all brown earthenware and common stone ware twenty per centum *ad valorem*; on all other earthen, stone or crockery ware, printed, white, glazed, edged, painted, dipped or cream colored, composed of earthy or mineral substances, twenty-five per cent. *ad valorem*, and on page 189, Sec. 20, * * * "brick, fire-brick, roofing and paving tile n. o. p. f.

Revised Statutes, Schedule 8, Title 33, on Earths and Earthenware, reproduces Sec. 9, Act June 30, 1864, 13 Stats., 210, and it imposed on "all other earthen, stone or crockery ware, white, glazed, edged, printed, painted, dipped or cream colored, composed of earthy or mineral substances, and not otherwise provided for, 40 per centum *ad valorem*." Schedule M, Revised Statutes: "Brick, fire-brick and roofing, and paving tile not otherwise provided for, twenty per centum *ad valorem*.

Tiles therefore are not earthenware, as that term is used in the statutes (Arthur vs. Stephani, 96 U. S., 125). We annex hereto as Appendix 3 (to show the practice of the Treasury Department) a distinct ruling in its regulations of 1857, page 588, deciding that tile,

not being a "ware," cannot be classed as earthen, china and all other wares composed of earthy substances, but as tiles for roofing or paving directly or by similitude, which is the precise theory of our protests. We add also to this appendix a late Treasury decision, No. 8044, made in 1887, applying the same rule to certain cement bricks as assimilating to bricks and tiles.

In connection with these decisions of the Treasury Department, holding that tiles were not "ware," and up to the present litigation in March, 1883, the rulings of the Department and the practice thereunder has been as indicated in Treasury Decision No. 2785 (see Appendix No. 4), which exactly applies, here holding that glazed tiles used for hearths and bath-room floors were paving tile. This refund, under Sec. 4, Act March 3, 1875 (18 Stats. 469), was required to be reported to Congress. The Act of 1883 is presumed to have been passed with the knowledge of that decision. At all events, the rule and practice at the date of the present law was that glazed tiles for floors and hearths were paving tiles.

Ross vs. Fuller, 17 Fed. Reporter, 226, middle.

The contemporaneous construction of a statute by the Executive Department, practiced and acquiesced in for a long series of years, fixes its construction and precludes the Government, if not all other parties, from disputing its correctness.

Robertson vs. Downing, 127 U. S., 613.
U. S. vs. Johnson, 124 U. S. 253, middle, and references.
U. S. vs. Hill, 120 U. S., 182 and references.
Brown vs. U. S., 113 U. S., 571 and references.
Stairs vs. Peaslee, 18 How., 530.

EDWARD HARTLEY,
Counsel for Plaintiff in Error.

APPENDIX NO. 1.

EXTRACT FROM SUPPLEMENTAL ANNUAL REPORT TO CONGRESS OF DANIEL MANNING, SECRETARY OF THE TREASURY, DECEMBER 13, 1886. VOL. 2. COLLECTION OF DUTIES, P. XLVII.

"New ambiguities in the Law of 1883 have come to light in 1886. They are exhibited in the subjoined Appendix E, and there has been added a sketch of legislation to remedy them for the future, on the theory that the decisions of the Department express the wishes of Congress in that regard."

APPENDIX E (EXTRACT).

"* * * As requested in the last paragraph of your letter, I enclose herewith such 'pertinent sections of new laws to be proposed to Congress' as would, in my opinion, if passed, definitely settle the points presented in the more numerous classes of appeals above mentioned.

"Respectfully submitted,

"J. G. MCGREGOR,

"Chief Customs Divisions."

SCHEDULE B. EARTHENWARE AND GLASS WARE.

Amend paragraph No. 127, commencing "all other earthern, stone and crockery ware," by inserting after the words "not specially enumerated or provided for in this act" the words "*including tiles*," so that the paragraph shall read as follows: All other earthen, stone and crockery ware, white, glazed or edged, composed of earthy or mineral substances not specially enumerated or provided for in this act, including *tiles*, fifty-five per centum *ad valorem*.

Congress did not act upon these recommendations.

APPENDIX 2.

TREASURY DEPARTMENT.

OFFICE OF THE SECRETARY,
WASHINGTON, D. C., February 27, 1882.

COLLECTOR OF CUSTOMS, New York :

SIR—The Department is in receipt of letters from the U. S. Attorney at New York dated the 7th and 19th of November last, respectively, in relation to the decision of the Court in the suit (N. S., 6367) of Tiffany *et al.* vs. Merritt, which held that certain painted plaques classified as "earthenware painted (Heyl, 935) at a duty of 40 % *ad valorem* were liable to duty at the rate of 10 % *ad valorem* under the provision (Heyl, 1394) for "paintings not otherwise provided for."

These plaques the United States Attorney reports were painted by hand on earthenware manufactured for the express purpose of being painted upon, and not for use as articles of earthenware, and were covered, as the Court remarked during the trial, by the decision of the United States Supreme Court in the case of Jacoby *et al.* vs. Arthur (S. S. 4814) concerning the dutiable character of certain paintings on porcelain.

The United States Attorney recommends that the decision be acquiesced in, and you are authorized, in view of such recommendation, and of the ruling of the United States Supreme Court, to take the usual steps for the payment of the judgment when it shall be duly entered on the records of the Court, as well as for the settlement of any other cases involving the same question. The rule adopted in decision 4814, by which to determine whether the articles are to be classified as paintings or as decorated china or porcelain ware is that when an article of itself is one of utility, like a dish

or a vase, so as to be ware when not decorated, it remains ware after decoration, and is not to be considered a painting.

When china or porcelain is made manifestly for the purpose of merely being painted upon as a vase on which to display a painting, it is a painting in the same sense that a painting on canvas or on silk is a painting. * * *

Very respectfully,

H. F. FRENCH,

Assistant Secretary.

APPENDIX NO. 3.

(TREASURY DECISIONS.)

Regulations of Treasury Department under the Revenue Laws of 1887, page 588—Tiles for Draining. Application having been made for the entry of this article, it was decided by the Department that, not being a "ware," it could not be classed under Schedule A as "earthen, china, stone ware and all other wares composed of earthy substances;" but that, being of a description of tiles, it should be classed as such under Schedule E of the Tariff Act of 1846 as tiles for roofing and paving; or, the article being unenumerated, it might be classed under Section 20 of the Tariff Act of 1842, and be thus assimilated to and classed with "paving and roofing tiles," so designated in Schedule E in the Tariff Act of 1846, being assimilated thereto in the material, nature, quality and use to which it may be applied.

[8044]

TREASURY DEPARTMENT,
February 10, 1887.

SIR—The Department is in receipt of your letter of the 7th ultimo transmitting the appeal (9959°) of Messrs. Schultze-Berge & Koechl from your assessment of duty at the rate of 25 per cent. *ad valorem* on certain so-called "cement bricks" imported by them per "Jan Brydell" December 8, 1885, and returned by the Appraiser at your port as "common stoneware," which are claimed by the appellants to be dutiable at 20 per cent. *ad valorem*. From an inspection of the sample submitted and the reports of the Appraiser and the chemist it appears that the merchandise in question consists of square perforated bricks or tiles, made of Portland or other cement, which assimilate in all essential particulars to bricks or floor tiles. It is therefore held, in accordance with Section 2499, R. S., that such articles, not being otherwise provided for, are covered by the clause in Schedule B (T. I., 130) for "brick, fire brick and roofing and paving tile," and are dutiable at the rate of 20 per cent. *ad valorem*. You are instructed to reliquidate the entry accordingly, and to take measures for refunding the excess of duty exacted.

Respectfully yours,
C. S. FAIRCHILD,
Assistant Secretary.

COLLECTOR OF CUSTOMS,
New York.

APPENDIX NO 4.

#2785.

GLAZED TILES—DUTY ON.

TREASURY DEPARTMENT, May 1, 1876.

SIR—Your letter of the 27th ultimo is received reporting on the appeal (9208*d*) of Messrs. Miller & Coates from your assessment of duty at the rate of 40 per centum *ad valorem* on certain glazed encaustic and paving tiles imported by them per "Egypt" February 3, 1876, and claimed to be entitled to entry at the rates of 35 per cent. and 20 per cent. *ad valorem* respectively, under the provisions in Schedule M, Section 2504, Revised Statutes, for "Encaustic tiles and paving tile not otherwise provided for."

It appears from the special report of the Appraiser, and an examination of the samples submitted by the appellants, that the tiles in question are used for paving hospitals and hearths, where glazed tiles are necessary, and that they differ only from the ordinary encaustic and paving tile in the fact that they are glazed.

The Department is of opinion that the glazing of said tiles is not such a change in their condition as to remove them from the category of "Encaustic" and "paving tiles" specially provided for, and you are therefore authorized to readjust the entry accordingly, and to forward a certified statement for the refund of the excess.

Respectfully,

CHAS. F. CONANT,

Acting Secretary.

COLLECTOR OF CUSTOMS,

New York.

Supreme Court, U. S.
APR 20 1892
JAMES H. McKENNEY,
Clerk.

In the Supreme Court of the United States.

OCTOBER TERM, 1891.

ADOLPH ROSSMAN, PLAINTIFF IN ERROR,
vs.
EDWARD L. HEDDEN, LATE COLLECTOR. } No. 332.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

BRIEF FOR DEFENDANT IN ERROR.

A. X. PARKER,
Assistant Attorney-General.

In the Supreme Court of the United States

OCTOBER TERM, 1891.

ADOLPH ROSSMAN, PLAINTIFF IN ERROR,
vs.
EDWARD L. HEDDEN, LATE COLLECTOR. } No. 332.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

BRIEF FOR DEFENDANT IN ERROR.

STATEMENT.

This case is brought up by writ of error from the circuit court for the southern district of New York, where the action was commenced in November, 1886.

The claim of the plaintiff below, the plaintiff in error here, is based upon three importations of tiles which were entered at the port of New York in 1886. It is shown by the bill of particulars (fol. 7) that one invoice of the tiles came by the *Canada* from Havre, being entered Feb-

ruary 26, and the amount of alleged excessive exaction being $12.20; another came by the *Furnessia*, from Glasgow, being entered May 25, the amount of alleged excessive exaction being $59.60; and the third, by the *Rhaetia*, from Liverpool, being entered June 15, the amount of alleged excessive exaction being $84.35, the three sums stated making the $156.15 claimed by the complainant.

The case was tried before Judge Lacombe and a jury in October, 1888.

As to the importation by the *Canada*, the court charged that the verdict must be for the defendant, "for the reason that the payment was not in fact made to obtain possession of the goods."

As to the second importation the court directed a verdict for the defendant because the protest restricted the claimant to a single ground that had not been established by the testimony. (Fol. 22.)

As to the importation by the *Rhaetia* the jury found, in substance, that the articles were earthenware, and that the classification of the collector was correct, and a verdict was rendered in defendant's favor. (Fols. 23, 25.)

Judgement was entered against the plaintiff, February 5, 1889, for $46.85, taxed costs. (Fol. 13.)

THE TILES.

It is stated that the tiles in dispute were called in trade plain glazed and plain enameled tiles (fol. 17); and that—

> Those having the color in the glaze are termed enameled, and those having the color in the body are termed plain glazed.

The goods were described in the plaintiff's entries as follows:

(1) By the *Canada*, February 26, 1886: Two packages encaustic tiles.

(2) By the *Furnessia*, May 25, 1886: Eight casks plain white tiles.

(3) By the *Rhætia*, June 4, 1886: Eight hogsheads one case earthenware tiles.

The invoice by the *Furnessia* described the goods as glazed earthenware tiles.

Plaintiff's case as presented upon the trial is set forth on page 9, and is as following:

Testimony was given on the part of the plaintiff by dealers in tiles of long experience that on March 3, 1883, and immediately prior thereto, the tiles in suit were used in this country to lay down in cement in vestibules, on hearths, bathroom floors and walls, on kitchen floors under sinks, interspersed with unglazed tiles on floors in church chancels, conservatories, hospital floors and walls, and generally in places where either a nonabsorbant cleanly tile was required or where there was little wear and tear and a particularly ornamental effect was desired.

Testimony was also given on the part of the plaintiff by importers and large dealers in tiles of many years experience that at the date of the passage of the act of March 3, 1883, the term paving tile had no meaning in the trade and commerce of this country different from its ordinary meaning, and meant tiles used for paving, and gave evidence tending to show that plaintiff's importations per *Canada* and *Rhætia* were such tiles.

Testimony was also given on the part of the plaintiff by architects of long experience in this country

that plaintiff's tiles were used for paving purposes; that tiles used for hearths were considered paving tiles; that the hearth architecturally was a part and an extension of the floor, and that a paving tile was a tile made to be laid horizontally and flat and intended so to be used.

It appeared, however, that the principal use of the tile imported per *Furnessia*, represented at the trial by sample Exhibit No. 5, was for walls, though sometimes used for hearths, bathroom floors, and under kitchen sinks and other places at the date of the passage of the act of March 3, 1883; that it was used for the same general purposes as glazed encaustic tiles.

That encaustic tiles consist of two varieties, glazed and unglazed; the unglazed being generally used for floors and hearths and the glazed being generally used on walls, though sometimes for hearths and other places.

Testimony was also given on the part of the plaintiff by large dealers in earthenware of long experience that the term "earthenware," as used in the trade and commerce of this country, does not and did not at the date of the passage of the tariff act of March 3, 1883, include tiles of any kind, but referred principally to tableware and pottery.

It further appeared that all the tiles in suit and all paving and encaustic tiles described in tariff Schedule B are made of clay, all baked in kilns, and generally made by the dust process from pulverized clay, molded under pressure in a dry state.

The abstract of the testimony given on the part of the defendant appears on page 10, and is so terse and important that it can not well be reduced into a smaller compass.

It is as follows:

Witnesses on the part of the defendant, including manufacturers of tiles, officers of tile companies, dealers, and salesmen of tiles, tile-designers, and architects, all of large and long experience, testified that the term paving tile had a well-known designation and definition in the trade and commerce of this country on March 3, 1883, and prior thereto, and referred to an unglazed, hard-baked tile used for flooring purposes, and that the term paving tile and flooring tile at that time were interchangeably used to denote the same kind of a tile; that the tiles in suit were made of a different kind of clay from the so-called paving tile; that the body of the plaintiff's tiles in suit was softer, more porous, and a more expensive body than the body of a paving tile; that the body of the tiles in suit was composed of china clay, Cornwall stone, and flint, and some other materials, costing from $15 to $22 a ton, while the clay used in the manufacture of paving tile is a different and cheaper kind of clay, worth $1.50 a ton, and is not porous and not absorbent, and which body is baked hard to stand the wear and tear of being trod or walked upon; that paving tiles were used to be walked and trod upon where there was wear and tear, and that the tiles such as plaintiff's were used for walls, facings, dadoes, and decorative purposes, and sometimes used in modern hearths, which are protected by a fender and raised from the floor and not to be walked upon, and are considered part of the mantels and grates and not as a part of the floor; that such tiles as plaintiff's have been used somewhat for hearths since March 3, 1883, and were not used to any extent on hearths prior to March 3, 1883.

That the tiles in suit were not adapted for any wear and tear, and would be dangerous to walk upon

on account of their slippery surface, and easily become broken if used for flooring purposes, except for ornament on floor borders. That encaustic tiles are made of several kinds of clay instead of one only, with the colors burned in.

That encaustic tiles are both glazed and unglazed; that the unglazed encaustic were sometimes used for flooring purposes, and the glazed encaustic were for ornamental purposes, and for walls, dadoes, and facings.

The tiles are now generally made by the dust process, dry clay being subjected to great pressure in molds, and then baked; that the paving tiles are baked once, the glazed or enameled tiles are baked twice; that the modern hearth is about 18 or 20 inches wide, guarded by a brass or iron fender, and is not used to be walked upon, and that such hearth is not considered by architects to be a part of the floor.

The testimony of a potter of very long experience tended to show that in his experience these articles were earthenware.

THE TARIFF PROVISIONS.

By the tariff act of March 3, 1883 (22 Stat., 488), section 2499 of the Revised Statutes is amended (p. 491) so as to read as follows:

SEC. 2499. There shall be levied, collected, and paid on each and every non-enumerated article which bears a similitude, either in material, quality, texture, or the use to which it may be applied, to any article enumerated in this title as chargeable with duty, the same rate of duty which is levied and charged on the enumerated article which it most resembles in any of the particulars before mentioned; and if any non-enumerated article equally resembles two or more enumerated articles on which different rates are

chargeable, there shall be levied, collected, and paid on such non-enumerated article the same rate of duty as is chargeable on the article which it resembles paying the highest duty. * * *

It is believed that the only other statutory clause of serious influence in this investigation is that setting forth the earthenware provision of the same act.

At page 495 there appears the subdivision—

Schedule B. Earthenware and glassware.

Paragraph 1 relates to brown earthenware, common stoneware, and gas retorts, and imposes 25 per cent thereon.

Paragraph 2 relates to china, porcelain, etc., painted, printed, gilded, or ornamented, and imposes 60 per cent thereon.

Paragraph 3 relates to china, porcelain, etc., plain, white, and not ornamented, and imposes 55 per cent thereon.

Paragraphs 4, 6, and 7 are respectively as follows:

(*a*) All other earthen, stone, and crockery ware, white, glazed, or edged, composed of earthy or mineral substances, not specially enumerated or provided for in this act, fifty-five per centum ad valorem.

(*b*) Encaustic tiles, thirty-five per centum ad valorem.

(*c*) Brick, fire brick, and roofing and paving tile, not specially enumerated or provided for in this act, twenty per centum ad valorem.

The collector exacted 55 per cent ad valorem on all three of the importations (fol. 15) under the paragraph marked (*a*).

The importer protested that the tiles coming by the *Furnessia* were dutiable at 35 per cent ad valorem under section 2499, Revised Statutes, by similitude to encaustic tiles under paragraph marked (*b*).

The importer protested that the tiles brought in by the *Canada* and the *Rhaetia* were dutiable at 20 per cent ad valorem under paragraph marked (*c*), directly or by virtue of section 2499, Revised Statutes; and that "if not so dutiable, then they should pay 35 per cent by similitude to encaustic tiles under said section and schedule," to wit, by similitude under paragraph marked (*b*).

POINTS.

PLAINTIFF HAS NO VALID CLAIM FOR DUTIES PAID ON THE TILES IMPORTED BY THE CANADA.

The amount here claimed under the bill of particulars is $12.20. The goods imported by the *Canada*, from Havre, entered at New York February 26, 1886, were described in plaintiff's entries (fol. 17), as "Two packages of encaustic tiles."

The protest was "that they were dutiable at 20 per cent ad valorem under tariff schedule B, as paving tile, directly, or by virtue of section 2499, Revised Statutes. If not so dutiable, then they should pay 35 per cent by similitude to encaustic tiles under said section and schedule." (Fol. 16.)

The collector exacted a duty of 55 per cent ad valorem (fol. 7, foot), under the fourth clause of schedule B of the tariff act of 1883 (22 Stat., 495).

It is shown in said folio (p. 8) that a portion of the duty was paid on the day of entry (February 26) and that the remainder was paid May 10 thereafter.

It is also shown that both of the packages of this importation "were delivered to the plaintiff on or before March 18, 1886."

It is a familiar statutory rule that, in order to recover, the importer must have made payment of the money he seeks to recover back "under protest and in order to obtain possession of" the goods.

As Rossman had been in possession of his tiles for seven weeks before he paid the excess claimed, he did not pay to obtain possession.

The court instructs the jury (fol. 22, p. 11):

> In the first place, as to the importation by the *Canada*, as I have before intimated, your verdict must be for the defendant, for the reason that the payment was not in fact made to obtain possession of the goods.

The plaintiff's counsel excepted, but no testimony or ground is shown in the record why the rule invoked should not be controlling and final.

Plaintiff's counsel, in his brief (p. 2, near top), seeks to escape this conclusion by claiming that plaintiff paid the difference between paving tile (20 per cent) and encaustic tiles (35 per cent) to get possession of the goods.

There is no foundation for this theory, as the tiles brought by the *Canada* were described by the plaintiff's entries as "two packages of encaustic tiles." As such goods were chargeable by law with a duty of 35 per cent,

the collector was prohibited from taking less. Duty paid on entry was $126.10; that exacted by the collector was $140.40.

The bill of particulars claims $12.30.

It is scarcely possible that the trial could have been completed to the point of the final instructions to the jury, and the direction of a verdict as to the Canada importation, without notice to the court of the fact that plaintiff's claim was for the excess between the 20 and the 35 per cent if such had been the fact.

The bill of particulars throws light upon this point of contention. It is stated in folio 16 that the increased duty (between 35 and 55 per cent) was paid May 10, while the 35 per cent had been paid on the date of the entry at custom-house (February 26); the bill of particulars states: "Protest filed and date of appeal to Secretary of the Treasury" May 10 (p. 4).

The protest is omitted in the record, but the date thereof and of the appeal support the view of the court below as to the claim which the protest was then understood to make.

II.

THE PLAINTIFF HAS NO VALID CLAIM FOR DUTIES PAID ON THE TILES IMPORTED BY THE FURNESSIA.

The amount here claimed is $59.60.

The goods imported by this vessel, from Glasgow, entered at New York May 25, 1886, were described in the plaintiff's entries (fol. 17) as "eight casks plain white tiles." The invoice described them as "glazed earthenware tiles."

It is stated in the record at the beginning of folio 16, as to plaintiff's protest, that—

> The ground of his objection stated in his protest was, as to the *Furnessia*, of May 25, 1886, that said tiles were dutiable at 35 per cent ad valorem, under section 2499, Revised Statutes, by similitude to encaustic tiles, provided for in tariff, schedule B.

The collector exacted a duty of 55 per cent ad valorem under the fourth paragraph of Schedule B of the act of 1883.

In folio 19 the bill of exceptions recites that—

> It appeared, however, that the principal use of the tile imported per *Furnessia*, represented at the trial by sample, Exhibit No. 5, was for walls, though sometimes used for hearths, bath-room floors, and under kitchen sinks and other places, at the date of the passage of the act of March 3, 1883; that it was used for the same general purposes as glazed encaustic tiles.

It appears (fol. 22) that the court directed a verdict for the defendant as to these goods, in the following words:

> With regard to the importation by the *Furnessia*, the protest of the plaintiff restricted him to a single claim, to wit, that these goods were similar in uses, quality, material, and texture to encaustic tiles and should therefore pay the same duty as that paid by encaustic tile. In the view which I take of the similitude clause and guided by the decisions of *Smith* v. *Field* (105 U. S., 53) *Sussfeld* v. *Arthur* (96 U. S., 128) and *Arthur* v. *Butterfield* (125 U. S., 70), I shall, as to the importations by that particular vessel, direct a verdict for the defendant.

An exception to this direction was noted, but the record discloses nothing which indicates that the protest or the character of the goods were otherwise than as above stated.

There is no suggestion in the case that there was any claim in the protest relating to this importation that these tiles were encaustic tiles, or that they were paving tile, or that they were in similitude to paving tile.

The plaintiff in his argument here seems to ignore his protest and to make his claim upon some general principles which disregard the conditions upon which the Government permits itself to be sued.

The protest rests upon the sole ground that the articles "were dutiable at 35 per cent ad valorem, under section 2499, Revised Statutes, by similtude to encaustic tiles." (Fol. 16.)

The court holds that they are not shown to be encaustic tiles by similitude and directs a verdict for defendant.

It is insisted in behalf or the defendant in error that so much of the testimony in the record, and so much of the argument in plaintiff's brief as relates to paving tile, has no possible application to the tile imported by the *Furnessia*.

The brief of plaintiff's counsel, in point IV, without specifying the *Furnessia* goods, seems to claim that they were subject to only a 20 per cent duty as paving tile, but if the court holds them to be paving tile, directly or by similitude, then the protest does not cover them and it is as though no protest had been made.

That the "plain white tiles" of the *Furnessia* were used for walls, and sometimes for hearths, bath-room floors, and under sinks, and for the same general purposes as glazed encaustic tiles, is of no consequence if they were covered by the fourth paragraph of the schedule, and are thus enumerated under the rule of *Mason* v. *Robertson*.

The same is true if they are to be classified as paving tile.

A reading of the evidence on pages 9 and 10 is almost conclusive that the issue tried was whether the articles were earthenware or whether they were paving tile, and the *Furnessia* importation was withheld from this controversy by the terms of the protest.

The court below based its direction to the jury upon *Sussifield* v. *Arthur*, *Smith* v. *Field*, and *Arthur* v. *Butterfield*, and held that the similitude section of the statute did not apply to the goods brought by this vessel.

These cases are cited and their doctrine is still further illustrated by the decision and opinion in the following case.

Mason v. *Robertson* (139 U. S., 624) is the latest declaration of this court upon the application of the similitude provision of the statute.

The opinion, delivered by Mr. Justice Gray, refers to previous cases and states the law as follows:

> The general scope of the similitude clause in the customs acts is defined in a recent judgment of this court, delivered by Mr. Justice Field as follows: "To place articles among those designated as enumerated, it is not necessary that they should be specifically mentioned. It is sufficient that they are des-

ignated in any way to distinguish them from other articles. Thus the words 'manufactures of which steel is a component part' and 'manufactures of which glass is a component part' have been held a sufficient designation to render the goods enumerated articles under the statutes and to take them out of the similitude clause. (*Arthur* v. *Sussfield*, 96 U. S., 128.) Upon the same principle, 'manufactures of hair' must be held as sufficient designation to place such manufactures among the enumerated articles. (*Arthur* v. *Butterfield*, 125 U. S., 70, 76, 77.)" So the description "manufactures composed wholly of cotton," or even "manufacture of cotton," has been held to be a sufficient enumeration. (*Stuart* v. *Maxwell*, 16 How., 150; *Fisk* v. *Arthur*, 103 U. S., 431. See also *Hartranft* v. *Meyer*, 135 U. S., 237.)

In the customs act of 1883, schedule A, entitled "Chemical Products," besides defining the duties on more than a hundred kinds of such products, makes the duty on "all chemical compounds and salts, by whatever name known, and not specially enumerated or provided for in this act, twenty-five per centum ad valorem." The designation, "all" chemical compounds and salts, by whatever name known, includes all chemical compounds and chemical salts used then or thereafter in any science or art, as clearly as if the proper names of each and all of them had been given. Bichromate of soda, being undoubtedly a chemical compound and a chemical salt, is within the very words of the schedule, and can not therefore be treated as a nonenumerated article, within the similitude clause.

It is submitted that the words used in the paragraph adopted by the collector, to wit: "All other earthen, stone, and crockery ware," mean something more than

"crockery ware," and that the succession of the words, "composed of earthy or mineral substances," still further broadens the paragraph; and that "plain white tiles," "glazed earthenware tiles," are, to apply the words used in *Mason* v. *Robertson*, "within the very words of the schedule, and can not therefore be treated as a nonenumerated article within the similitude clause."

It is respectfully submitted that nothing shown in the record required the submission to the jury of the question whether these articles imported bore a similitude to encaustic tiles, and that no other question was at issue in relation to the *Fucnessia* shipment.

III.

THE JURY WAS PROPERLY INSTRUCTED AS TO THE IMPORTATION BY THE RHAETIA AND ITS FINDING IS CONCLUSIVE.

The amount of alleged excessive exaction is $84.35.

Here the protest claimed the right to enter the goods at 20 per cent, and, "if not so dutiable," then at 35 per cent; that is, first, that these tiles were paving tiles or similar to paving tiles; second, that they were similar to encaustic tiles.

The plaintiff in entering his goods enters them, in terms, as "eight hogsheads one case of earthenware tiles." (Fol. 17.)

The collector assesses them as earthenware, composed of earthy substances, at 55 per cent.

The testimony on both sides (pp. 4, 5) clearly involves this importation, and although a little of it, and that in-

consequential, points to encaustic tiles, the contention is plainly, on one side to show the articles paving tile, on the other to show them earthenware.

Upon this issue there was evidence supporting the respective sides, and the jury found against the plaintiff.

On hearing this testimony the court said there was no "room for the similitude doctrine," and the fact found by the jury was that this importation was not paving tile.

This finding was clearly authorized by the testimony.

The position of the court below as to this importation is shown by the following extract from the trial proceedings (fol. 23):

> There is then left for your consideration only the importation by the *Rhaetia*.
>
> The old English word "ware," with which you are familiar in the combination of hardware, tinware, etc., is a comprehensive word. It is defined by Worcester and Webster as "goods, commodities, merchandise," and in the same dictionaries the term "earthenware" is defined as ware made of earth or clay.
>
> Reading for the word "ware" the definition which the dictionary gives for it, we will find as the definition of "earthenware," "goods," commodities, or merchandise made of earth or clay.
>
> That, you see, is a very general, broad, and comprehensive word, and it was evidently used by Congress in that same sense, for we find the word "earthenware" used as the heading of a schedule which contains articles as dissimilar as a porcelain teacup, a Parian vase, a firebrick, and a slate pencil.
>
> To which plaintiff, by his counsel, then and there excepted.

> It is sufficiently broad, this word earthenware, to cover tiles, to cover the articles imported by the plaintiff here as they appear and have been described by the witnesses; therefore, unless they are covered by some other provision of the tariff act, they must be held dutiable as earthenware and the determination of the collector in that respect sustained.

Tile is defined (Webster's International, p. 1508)—

> 1. A plate, or thin piece, of baked clay, used for covering the roofs of buildings, for floors, for drains, and often for ornamental mantel works.

Encaustic tiles are defined as follows (*Id.*, p. 488):

> Encaustic tile (fine arts), an earthenware tile which has a decorative pattern and is not wholly of one color.

The defendant's testimony shows that at the time of the passage of the act paving (or flooring) tiles were commercially known as unglazed, hard-baked tile; and that the tiles in suit were of a different kind of clay from paving tile; that the body was softer, more porous, and more expensive than the body of paving tile; that the body of the tiles in suit was composed of China clay, Cornwall stone, and flint, etc., costing from $15 to $22 per ton, while paving-tile clay is worth but $1.50 per ton.

It is plain that these tiles were not adapted for use as floor tile, and were in fact a decorative earthenware tile.

The evidence concludes as follows (F. 21):

> The testimony of a potter of very long experience tended to show that in his experience these articles were earthenware.

The paragraph under which the collector dutied these tiles imposes 55 per cent upon "all other earthen * * * ware," etc.

Plaintiff's brief (p. 13, foot) gives as Webster's definition: "Earthenware, ware made of earth; crockery."

But Webster's International (p. 466) defines earthen as follows:

> Earthen, made of earth; made of burnt or baked clay, or other like substances; as, an earthen vessel or pipe.

This latest authority also gives the following definition:

> Earthenware, Vessels and other utensils, ornaments, or the like, made of baked clay. (*Id.*)

The cross references are "crockery, pottery, stoneware, and porcelain," and it is submitted that the words "*or the like*" and "*pottery*" are broad enough to include the tiles in suit under the paragraph invoked by the collector.

IV.

THE ARRANGEMENT AS WELL AS THE PHRASEOLOGY OF THE TARIFF ACT OF 1883 CLASSIFIES TILES AS EARTHENWARE.

Plaintiff insists (Brief, p. 15) that Schedule B has three subdivisions or groups: "(1) earthenware; (2) tiles, brick, and slate; (3) glass and glass articles;" and his argument needs such a subdivision.

But the statute makes a direct contradiction of this grouping.

The statutory grouping is:

> "Schedule B—Earthenware and glassware."

There are but two classes; one is from earths, the other from glass.

All of the articles in this schedule must be grouped under one or the other of these two heads, or the law-making branch of the Government is overruled in its own department.

After the first nine paragraphs all of the schedule relates to glass.

None of the first nine have any relation to glass. Plaintiff admits that the first five paragraphs relate wholly to earthenware. The four that he seeks to create a new group of are as follows:

> Encaustic tiles, thirty-five per centum ad valorem.
>
> Brick, fire brick, and roofing and paving tile, not specially enumerated or provided for in this act, twenty per centum ad valorem.
>
> Slates, slate pencils, slate chimney-pieces, mantels, slabs for tables, and all other manufactures of slate, thirty per centum ad valorem.
>
> Roofing slates, twenty-five per centum ad valorem.

The first two paragraphs are of earths, baked or artificially solidified; the other two are of earths hardened by nature.

The manufactures of slate designated are in similitude of well-known forms and uses of baked clay; roofing slates are in similitude of roofing tiles; and the encaustic tiles, brick, and other tiles are forms of baked clay. All are wares of earth.

These clauses with the first five paragraphs constitute the "earthenware" of the schedule in accordance with the plan, intent, and phraseology of Congress.

It proves nothing to assert that these things were separate in some former legislation; they are now brought together and grouped and classified plainly and with an intelligent purpose.

It is not for plaintiff's counsel to insist that "tiles, brick, and slate" are a strange group brought into the list of earthenwares by accident or without judgment or effect, and that the articles so brought are to be treated as though not in this schedule, or as though Congress had established three groups instead of two, unless he is to be allowed to change rather than to obey the statute.

V.

PLAINTIFF CLAIMS THAT THE COURT BELOW ERRED IN REFUSING TO RECEIVE TESTIMONY OF AN ALLEGED CHANGED USE OF THE TILES IN QUESTION WHICH HAD COME INTO EXISTENCE AFTER THE PASSAGE OF THE ACT.

Plaintiff sought to show (fols. 17, 18) that tiles were used after 1883 for different purposes than those they were used for at the date of the enactment of the tariff act of 1883; also that they were used at the date of the trial (1888) for paving bath-room floors; also the purposes for which tiles like these were used in 1888; also the purposes for which these tiles were *intended* to be used, and also for what purposes they were imported.

The plaintiff took exceptions to the refusal of the court to allow such proofs, and claims that evidence of a new use of the article imported, which use came into existence

after the passage of the charging act, and of which Congress could have had no knowledge, should be considered by the jury in determining the intent of Congress in imposing the duties charged by the several paragraphs of Schedule B.

It is submitted that this theory presented by point 2 of plaintiff's brief is disposed of by the rule declared in *American Net and Twine Co.* v. *Worthington* (141 U. S. R., 468), where the court, by Mr. Justice Brown, said:

> It is a cardinal rule of this court that in fixing the classification of goods for the payment of duties the name or designation of the goods is to be understood in its known commercial sense, and that their denomination in the market when the law was passed will control their classification without regard to their scientific designation, the material of which they may be made, or the use to which they may be applied. (*Two Hundred Chests of Tea*, 9 Wheat., 430, 438; *United States* v. *One Hundred and Twelve Casks of Sugar*, 8 Pet., 277; *Elliott* v. *Swartwout*, 10 Pet., 137; *Curtis* v. *Martin*, 3 How., 106; *Arthur* v. *Morrison*, 96 U. S. R., 108; *Swan* v. *Arthur*, 103 U. S. R., 597; *Schmieder* v. *Barney*, 113 U. S. R., 645; *Arthur* v. *Butterfield*, 125 U. S. R., 70; *Robertson* v. *Salomon*, 130 U. S. R., 412.)

VI.

Note 1.

Counsel begs to make special reference to the report of the trial of this case in the court below, which appears in 37 Fed., 100.

Some additional light is thrown upon the case by that report.

NOTE 2.

The claim of plaintiff's counsel that contemporaneous construction by the Treasury Department confirms his theory of the case is answered by a reference to Synopses 2419, 3352, 3705, 3714, 7051.

VII.

FINALLY.

It is respectfully submitted that substantial justice was done in the trial of this suit in the circuit court, and that no principle of law was violated, and that the judgment should be affirmed.

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